No. 83-1211

IN THE

Supreme Court of the United States

October Term, 1983

DONALD A. ALESSI and JOHN P. BARTOLOMEI,
Petitioners,

vs.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

MARK S. OCHS
(Counsel of Record) Committee on Professional Standards, Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg., 22nd Floor,
P. O. Box 7013, Capitol Station Annex
Albany, NY 12225
(518) 474-8816

GEORGE B. BURKE
(Counsel for Respondent) Committee on Professional Standards, Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg., 22nd Floor,
P. O. Box 7013, Capitol Station Annex
Albany, NY 12225
(518) 474-8816

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No. 83-1214

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Preliminary Statement.

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, which is based on an opinion of the New York Court of Appeals, on remand, entered on November 3, 1983. *Matter of Alessi and Bartolomei*, 60 N.Y. 2d 229. This opinion, affirmed, in light of this

Court's decision in *In re R.M.J.*, 455 U.S. 191 (1982), the Appellate Division of the New York State Supreme Court, Third Judicial Department, which found that petitioners had improperly solicited clients via direct mail. *Matter of Alessi, Bartolomei, Pedicone and Zablotny*, 88 A.D. 2d 1089 (3d Dept. 1982).

Statement of Case.

The petitioners Donald A. Alessi and John P. Bartolomei were New York partners in "The Legal Clinic of Cawley and Schmidt" (hereafter referred to as "Clinic"). The Clinic maintained offices for the practice of law in four cities in New York including Albany.

During August and September, 1979, Attorney Zablotny authored the letter involved in this matter and submitted it to both Alessi and Bartolomei who reviewed it, edited it and approved it for bulk mailing from each of the four offices. Approximately 1,000 letters were mailed to realtors from each office. The letter from the Albany office was signed by or on behalf of Pedicone, the Clinic's attorney in Albany.

The respondent herein served a Petition of Charges and Specifications upon the petitioners herein and Attorneys Pedicone and Zablotny, charging the respondents with violating the Code of Professional Responsibility and Section 479 of the Judiciary Law of the State of New York.

The respondents in the disciplinary proceeding moved to dismiss the Petition of Charges. Following the New York Court of Appeals opinion in *Matter of Greene*, 54 N.Y. 2d 118 (1981), *cert. denied*, 455 U.S. 1035 (1982),

which sustained an order of the Appellate Division, Second Judicial Department, holding an attorney had improperly solicited clients via direct mail to real estate brokers, the motion was denied and an answer to the Petition of Charges was filed.

The respondents in the disciplinary proceeding moved to refer issues raised to a judge to hear and report. The Appellate Division determined a reference was unnecessary and found respondents guilty of misconduct:

> [I]n permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith and in reliance on *Bates v. State Bar of Arizona* (433 U.S. 350) and prior to the decision of the Second Department in *Greene*, we determine that no sanction should be imposed for such misconduct.

Alessi and Bartolomei appealed to the New York Court of Appeals which on November 18, 1982, dismissed the appeal *sua sponte*, "upon the ground that no substantial constitutional question is directly involved."

On April 18, 1983, this Court granted petitioner's Writ of Certiorari vacating the judgment of the New York Court of Appeals and remanding the case to said Court for further consideration in light of *R.M.J.*

Upon remand, the New York Court of Appeals reaffirmed its earlier decision holding there is no constitutional infirmity in the application of Section 479 of the Judiciary Law and provisions of the Code of Professional Responsibility to the attorneys' conduct in approving the mailing by the legal clinic in which they were partners to some 1,000 realtors.

ARGUMENT I.

The decision below does not create a conflict with the decisions in other states.

Petitioners assert the decision below is in direct conflict with decisions on the same subject issued by at least two other State courts of last resort. *Matter of Jaques,* 407 Mich. 26, 281 N.W. 2d 469 (1979), is cited as a case in conflict. In *Jacques,* an attorney requested the business agent for a union to recommend employment of him to members and their survivors to handle their claims resulting from an explosion. The Court in a five to two decision held Jaques' conduct did not rise to the level of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' " which the disciplinary rules may properly seek to prevent, citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), 281 N.W. 2d at 470.

Jaques is disginguishable from the case in question for the reason that the Michigan Court, in its majority decision, failed to address the issue of a conflict of interest, which underpins the decision in the case below. In the decision below, the Court noted that:

> [T]he proscription is not against the attorney making known to potential clients the availability of his services or even to his doing so through third parties, but against his doing so in a particular manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client. 60 N. Y. 2d at 234.

There is a substantial governmental interest in preventing conflicts of interest in attorney-client relationships. *Matter of Greene,* 54 N. Y. 2d at 127.

In her dissent in *Jacques*, Chief Justice Coleman noted:

> The use of another person as an intermediary to solicit potential clients may pose dangers as substantial as soliciting them directly. 281 N.W. 2d at 476.
>
> The potential for overreaching or undue influence is substantial when the intermediary solicits the potential client in person. The intermediary may also be a professional, such as a salesperson, trained in the art of persuasion. Such in-person solicitation, like in-person solicitation by an attorney, "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection," *Ohralik, supra,* 436 U.S. 457, 98 S.Ct. 1919 * * *. Finally, the potential for all these harms increases if the intermediary has or perceives that he might have an interest in successfully soliciting clients. 281 NW 2d. at 477 (footnotes omitted).

The possible conflict of interest, present in the case below, was not present in *Jacques*. There the majority stated:

> His solicitation was directed to a union business agent who ostensibly represented the interests of union members which (*sic*) potential claims. The union agent possessed the expertise to make a detached and informed evaluation of Jacques' qualifications before passing any recommendation along to his members * * *. Under these circumstances, the union agent served as a buffer between the attorney and prospective clients thus alleviating the potential for overreaching and undue influence. 281 N.W. 2d at 470 (footnote omitted).

In the case below, as well as in *Greene*, the parties who were approached by the attorneys via direct mail to solicit clients on the attorney's behalf were professional salespeople in the guise of real estate brokers. The possible areas of conflict that could arise in such a situation have been identified by the New York Court of Appeals:

> The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale * * * *Matter of Greene*, 54 N. Y. 2d at 129.

Thus, *Jaques* is distinguishable from the case below. *See also, Woll v. Att'y Gen.*, 116 Mich. App. 791 (1982).

The other case petitioners cite to support their theory of a conflict among the states is *Kentucky Bar Association v. Stuart*, 568 S.W. 2d 933 (Ky. 1978). In that case, attorneys mailed letters to real estate brokers advising them they handled real estate work.

Stuart is distinguishable from the case in question. In *Stuart* as was the case in *Jaques*, the court did not consider the issue of a conflict of interest. In *Stuart*, the court merely recited that the letters sent by the attorneys did not "constitute 'in-person solicitation,' " citing *Ohralik*, 568 S.W. 2d at 934. The Kentucky court also failed to consider the

express warning of Justice Powell in *Ohralik*, that solicitation throught the use of intermediaries is as rife with potential problems as is first-person solicitation. 436 U.S. at 464, n. 22.

The *Jaques* and *Stuart* decisions were considered by the New York Court of Appeals in *Greene:*

> Both *Jaques* and *Stuart* may be distinguished on the ground that neither discussed potential conflict of interest, but to the extent that they cannot be so distinguished we decline to follow them. 54 N.Y. 2d at 129, n. 4.

Respondents submit that *Matter of Discipline of Appert*, 315 N.W. 2d 204 (Minn. 1981), cited by petitioners does not support their position herein. In fact, in *Appert*, the court stated:

> Overbearing and intrusive practices such as personal solicitation, direct or *indirect* * * * are not permitted. 315 N.W. 2d at 215. (Emphasis supplied.)

Petitioners neglected to point out that Louisiana also prohibits solicitation through an intermediary. *Allison v. Louisiana State Bar Association*, 362 So. 2d 489 (La. 1978).

Finally, petitioners argue the decision below conflicts with ethics opinions of various state bar associations. Those opinions do not constitute decisions of state courts of last resort. Therefore, petitioners cannot rely on them to support a request for review on writ of certiorari. 28 U.S.C. U.S. Sup. Ct. Rule 17.1.

In view of the fact there is no conflict between New York and any other sister state on the issues herein, there is no dispute to be put before this court.

ARGUMENT II.

The decision of the court below is not inconsistent with this court's holding in *R.M.J.* and related cases.

The earlier judgment of the court below was vacated by this court and remanded for further consideration in light of *R.M.J.* On remand, the court below did not find its prior decision to conflict with *R.M.J.* concluding:

> [T]here is no constitutional infirmity in the application of section 479 of the Judiciary Law and provisions of the Code of Professional Responsibility to respondents' conduct in approving the mailing by the legal clinic in which respondents are partners to some 1,000 realtors in the Albany area of a letter quoting fees for listed real estate transactions. 60 N.Y. 2d at 231.

As noted in Argument I, *supra*, the case below involved the issues of direct or indirect personal solicitation and the possibility of conflict of interest in the context of mailings to third parties. These issues were not present in *R.M.J.* but have been considered by this Court in earlier decisions.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this court held that "advertising by attorneys may not be subjected to blanket suppression." 433 U.S. at 383. The court went on to state, however:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services (433 U.S. at 384).

The Court did not hold attorney advertising may not be regulated in any manner and recognized that restraint might be justified on in-person solicitation. Further, "[a]s with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising" (433, U.S. at 384).

On the question of in-person solicitation, the court noted:

> [W]e also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runners". Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. 433 U.S. at 366.

The narrow scope of *Bates* was recognized in *R.M.J.*, 455 U.S. at 200.

In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), this court held:

> The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's

> countervailing interest in prohibition. 436 U.S. at 455.

The court noted where an attorney's exercise of judgment on behalf of his client may be clouded by his own pecuniary self-interest and the transaction is not visible or open to public scrutiny, or otherwise subject to effective oversight, the State may constitutionally impose a prophylactic measure whose objective is the prevention of harm before it occurs. 436 U.S. at 461, 464-467.

In *R.M.J.*, it was noted that in *Ohralik:*

> [T]he Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' " was so likely in the context of in-person solicitation, that such solicitation could be prohibited. 445 U.S. at 202.

While this court permitted direct mail to a prospective client in *In re Primus,* 436 U.S. 412 (1978), it was noted that there was no in-person solicitation for pecuniary gain. The court also noted the absence of "a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship." 436 U.S. at 436.

In *Matter of Koffler,* 51 N.Y. 2d 140 (1980), *cert. denied* 450 U.S. 1026 (1981), the New York Court of Appeals held that the State could not constitutionally prohibit advertising of attorney services by direct mail to potential clients. The court, however, explicitly reserved on the question of third-party mailings noting:

> For example, third-party mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are,

> therefore much closer to speech of the type *Ohralik v. Ohio State Bar Assn.* (436 U.S. 447) has held can be proscribed. 51 N.Y. 2d at 145, N. 2 (citation omitted).

R.M.J. also involved the issue of direct mail, to wit the sending of cards announcing the opening of an attorney's office. As noted by the court below, the fact that *R.M.J.* does not make mention of conflict of interest is not surprising inasmuch as conflict of interest was totally unrelated to the advertising under consideration in that case. 60 N.Y. 2d at 233, 234.

It is undisputed that the letter in the case below is not inherently misleading but "[e]ven when a communication is not misleading, the State retains some authority to regulate." *In re R.M.J.*, 455 U.S. at 203. It is at this point that the State must address the four part test enunciated in *Central Hudson Gas Company v. Public Service Commission*, 447 U.S. 557, 563 (1980). As stated in *R.M.J.*:

> [T]he *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public. 455 U.S. at 203, 204, n. 15.

Under the *Central Hudson* test, both petitioner and respondent agree the first two parts of the test pose no problem. The letter is protected by the First Amendment and is not misleading (part 1) and the asserted governmental interest is substantial (part 2).

It is the last two parts of this test that are crucial to a determination of the constitutionality of the State action. The two issues to be resolved are 1. Does this type of regulation directly advance a substantial governmental interest and 2. Is the regulation more extensive than necessary to serve the governmental interest.

There is a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects.

> The Supreme Court has many times recognized as a proper and substantial governmental interest the prevention of conflicts of interest. (*Matter of Primus*, 436 U.S. 412, 436 ["serious likelihood of conflict of interest"]; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 461, n. 19, *supra* ["we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest"], and see *id.*, at p 464, n 22; *NAACP v. Button*, 371 U.S. 415, 443 ["serious danger * * * of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent"]; see, also, *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 223-224). *Matter of Greene*, 54 N.Y. 2d at 127, 128.

It cannot be argued that *R.M.J.* overrules this court's prior decisions on conflicts of interest. This is made clear by the court's citation in *R.M.J.* of *Ohralik*, 445 U.S. at 202.

Clearly the potential for conflicts of interest exists in the facts of the case below. Present is the pecuniary interest

of both the attorney and broker. Further, since the broker is in direct contact with the prospective attorney's client, there is the in-person solicitation element together with the lack of sophistication of the usual client, the pecuniary interest of the solicitor and the difficulty or impossibility of obtaining reliable proof as to what occurred in such an encounter. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 464-466.

Examples of the possible areas of conflict are set forth under Argument I, *supra*.

While petitioner asserts there is an insufficient showing of a potential conflict of interest to warrant the regulation in question, as noted in *Ohralik* there is no requirement that there be "actual proved harm to the solicited individual." (436 U.S. at 464) and "the absence of explicit proof or findings of harm or injury is immaterial." *Id.* at 468. "[T]he potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment" is sufficient to justify "the need for prophylatic regulation in furtherance of the State's interest in protecting the lay public." *Id.*

The restriction imposed by the statute in question is not one upon content. "[A]s a regulation of the manner of speech, control of which in light of the governmental interest to be served, the lack of effectiveness of the medium and the more effective available alternatives, must be deemed reasonable, the statute as applied is constitutional." *Matter of Greene*, 54 N.Y. 2d at 127 (citations omitted).

Since the regulation directly advances a substantial State interest, the fourth part of the *Central Hudson* test must be applied. Although it has been suggested that a pre-filing

requirement might provide adequate protection (see, *Stuart, supra*) such an alternative would not solve the problem presented herein. While such a filing requirement might be adequate to protect against evils of direct mail addressed to clients, such a filing would not protect against the conflict of interest problems involved in an attorney's mailing to brokers. In such a case, the client relationship results not from the letter but from the intermediation of the broker.

Additionally, it should be noted that the Court below did not ban all third party mailings. The court in *Greene* expressly limited its ruling to third party mailing to brokers (54 N.Y. 2d at 126). As noted by the court below:

> What is proscribed is mailing to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result. 60 N.Y. 2d at 234.

The state regulation is no broader than necessary to protect the substantial governmental interests.

ARGUMENT III.

The decision below does not abridge petitioners' due process rights.

Contrary to petitioners' claim in Point III, constitutionally adequate notice was given that their action in soliciting clients through real estate brokers was impermissible and not validated by *Bates*.

The court below while acknowledging respondents had a right to fair notice of acts for which they could be

punished, found they had notice from section 479 of the Judiciary Law of the State of New York and Disciplinary Rule 2-103(A) of the Code of Professional Responsibility that all solicitation of legal business was proscribed. 60 N.Y. 2d at 236. In *Greene*, the court stated:

> The effect of our *Koffler* decision and of the Supreme Court decisions referred to in that opinion and in this is to leave the rule declared by the Legislature in section 479 of the Judiciary Law, free to operate in areas not affecting constitutionally free speech (*Belli v. State Bar of Cal.*, 10 Cal 3d 824, application for stay den 416 U.S. 965). Though amendment of the section might clarify the intention of the Legislature as a source, co-ordinately with the judiciary, of the public policy governing the conduct of lawyers, the absence of such amendment leaves no vacuum. The section remains effective except as constitutionally proscribed. 54 N.Y. 2d at 124.

As noted in the decision below, while respondents did not have the benefit of either *Koffler* or *Greene* before their letter was sent:

> [T]hey were then chargeable with knowledge from *Ohralik* and *Primus*, both decided by the Supreme Court on May 30, 1978, and its earlier decisions in *NAACP* and *Mine Workers*, that the constitutional invalidity of section 479 did not necessarily extend to solicitation involving personal contact and the potential for conflict of interest. 60 N.Y. 2d at 236.

Certainly, petitioners could not have concluded that *Bates* freed them from the strictures of Judiciary Law section 479. *Bates* clearly put attorneys on notice that it was a narrowly-drawn decision.

> The issue presently before us is a narrow one * * *. The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed. 433 U.S. at 366-368. (Emphasis in original.)
>
> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. *Id.* at 383.

Neither *Ohralik* nor *Primus* support petitioners' position. In *Ohralik*, this court held:

> The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert * * *. The State's perception of the potential for harm in circumstances such as those presented in this case is well founded * * *. Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems. 436 U.S. at 464 and 464, n. 22.

In *Primus*, it was noted:

> The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar * * *.
>
> We have no occasion here to delineate the precise contours of permissible state regulation. 436 U.S. at 438 and 438, n. 33.

Mathematical precision is not required before a statute can be enforced. No more than a reasonable degree of certainty can be demanded. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

Application of Judiciary Law section 479 as interpreted by the New York Court of Appeals does not violate petitioners' due process rights when their conduct has been judged not by the legislative standard alone but by that standard as constitutionally limited. *United States v. Raines*, 362 U.S. 17, 22 (1960).

Petitioners while on notice that the issue in *Bates* was very narrow, here claim that decision is so expansive as to, in effect, invalidate the statute in question on the ground that they had no notice of what type of conduct was proscribed. Contrary to their position, it is clear that all solicitation by New York attorneys, directly or indirectly is proscribed by Judiciary Law section 479 except for that conduct allowed by *Bates* and its progeny.

As Mr. Justice Holmes noted, "the law is full of instances where a man's fate depends on his estimating rightly * * *." *Nash v. United States*, 229 U.S. 373, 377 (1913).

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARK S. OCHS
(Counsel of Record)
Committee on Professional Standards
Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg.
22nd. Floor, P.O. Box 7013
Capitol Station Annex
Albany, NY 12225 (518) 474-8816

GEORGE B. BURKE
(Counsel for Respondent)
Committee on Professional Standards
Appellate Division, Third Department
Gov. A. E. Smith State Office Bldg.
22nd. Floor, P.O. Box 7013
Capitol Station Annex
Albany, NY 12225 (518) 474-8816